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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 868

ALONZO BULLOCK, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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THOMAS P. GORE, ESQ.,
Nashville, Tennessee,
W. E. MICHAEL, ESQ.,
Sweetwater, Tennessee,
ROSS R. BARNETT, ESQ.,
Jackson, Mississippi.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. .....

ALONZO BULLOCK, ET AL,
Petitioners,

versus

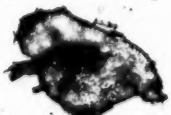
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

In *McSwain, et al v. County Board of Education of Anderson County, Tennessee, et al., 138 F. Supp. 570,* an order was issued requiring racial integration in the Clinton, Tennessee, High School. After this decision,



an injunction was issued in that cause on August 29, 1956, against interferring with the carrying out of the order. Thereafter, on February 25, 1957, an order of attachment was issued charging petitioner and others with a conspiracy to violate said order.

Petitioners here were convicted of criminal conspiracy before Judge Robert L. Taylor of the United States District Court for the Eastern District of Tennessee. No opinion was reported.

The United States Court of Appeals for the Sixth Circuit, on appeal of this cause, affirmed the convictions, classing them as convictions of criminal contempt, the style of the case being *Alonzo Bullock, et al. vs. United States of America, No. 13,512*, opinion dated February 27, 1959, not yet reported in the Advance Sheets of the Federal Reporter.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit, to review which this petition for certiorari is filed, is dated February 27, 1959.

The petition for extension of time for filing a petition for certiorari was filed within thirty days thereafter, and the time for filing such petition for certiorari was extended by Justice Potter Stewart to and including April 28, 1959, by order dated March 23, 1959.

The District Court had jurisdiction to convict petitioners for criminal conspiracy under USCA Title 18, Sec. 401(3),

and this Court has jurisdiction to grant a writ of certiorari under USCA Title 28, Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

QUESTION I. Was it not prejudicial error for the District Court to amend the original order of attachment that charged certain individuals, but not the petitioners herein, with certain specific acts alleged to have been violative of the injunction and then by amendment thereto adding new grounds and charging these defendants with criminal conspiracy in violating said injunction, thereby changing the cause of action without notice to any of these defendants?

QUESTION II. Was it not reversible error for the District Court to refuse to counsel for defendants under the *Jencks* case prior to trial on request the right to the production of all statements of witnesses bearing on testimony which might be given by government witnesses?

QUESTION III. Was it not reversible error for the District Court to refuse to instruct the jury to the effect that the Government having alleged an agreement or agreements between Kasper and each of the other defendants during the months of November and December 1956, was required by law to prove said agreement or agreements beyond a reasonable doubt and to a moral certainty?

QUESTION IV. Was it not reversible error for the lower court to instruct the jury that Rev. Turner's action was a "good deed" in the face of defendants' contention that it was a bad deed, and when that question of fact was an issue for the jury to decide?

QUESTION V. Was it not reversible error for the District Court to refuse to instruct the jury to the effect that the real parties in interest, the negro students, not having been called by the government to testify, the jury could properly conclude that their testimony would have been unfavorable to the interest of the government?

QUESTION VI. Was it not prejudicial and reversible error for the trial court to allow or permit the court below to issue to each member of the jury panel a pamphlet entitled "Handbook for jurors serving in the United States District Courts"?

QUESTION VII. Was the jury tampered with, and did this constitute prejudicial and reversible error?

The District Court decided each of the above questions in the negative, and its decision was affirmed by the Court of Appeals.

STATUTES INVOLVED.

USCA Tit. 18, Sec. 401, reads as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment VI of the Constitution of the United States reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV of the Constitution of the United States reads in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

This litigation began as a suit by Joheather McSwain, et al., against County Board of Education of Anderson County, Tennessee, et al., (R1a). On January 4, 1956, the District Court entered an order requiring and directing the discontinuance of racial segregation in Clinton High School, being one of the High Schools of Clinton, Tennessee. Pursuant to said order, the school officials of Anderson County ordered integration of the races in the school, to become effective at the beginning of the Fall term 1956. Integration of the races was put into effect by the administrative officials and teachers of the school. The Government charged that notwithstanding official compliance with the court's order of January 4, 1956, opposition from others than the said officials and teachers arose, aimed at preventing the effectiveness of integration and restoration of the school as a segregated school. On petition of D. J. Brittain, Jr., and others, the court on August 29, 1956, issued a temporary restraining order against one John Kasper and others enjoining and restraining them, their agents, servants, representatives, attorneys and all other persons who were acting or who may act or have acted in concert with them "from further hindering, obstructing, or in any wise interfering with the carrying out" of the integration order of January 4, 1956 (R26a). Thereafter said restraining order was, on August 31, 1956, continued in effect until September 6, 1956, at 1:00 P. M. (R29a).

and on September 6, 1956, said temporary restraining order was made permanent (R29a-30a). Thereafter on December 5, 1956, an order of attachment was issued by the court charging that certain individuals, named therein, but not including any of the appellants, had committed acts of criminal contempt charged in said order and ordering that said persons, not including any of the appellants, be attached for contempt (R19a).

Thereafter on February 25, 1957, the court, in chambers and without notice to any of the appellants issued an amended order of attachment (R22a) charging that the present appellants and others had notice of the permanent injunction of September 6, 1956, and that the present appellants and others had, during the months of November and December 1956, entered into an agreement or agreements to violate and to cause others to violate the injunction and that these appellants and others in active concert and participation with Frederick John Kasper "have violated the permanent injunction" in the respects set out in said amended order (R22a).

Appellants were thereafter arrested and entered into bond respectively for their appearance.

On June 11, 1957, prior to the trial, defendants requested the production of all statements and other matter bearing on the testimony which might be given by Government witnesses (R9a). On June 21, 1957, the Court denied this request (R9a). The request was again renewed at the trial and the Court there ruled that the defendants would be entitled only to statements of a

witness produced by the Government after the witness had testified and then only after the statements had first been given to the Court and the Court had deleted from the statement any portion thereof which it felt was not relevant or might be prejudicial (R31a). Counsel for defendants vigorously protested (R32a).

On the trial, Judge Taylor stipulated into the record that he was responsible for having distributed to the jury panel "A Handbook for Petit Jurors Serving in the United States District Court" (R82a). The practice of distributing this handbook to each juror as called was followed and the handbooks were delivered to the members of this jury (R83a). The handbook was introduced in evidence as Exhibit No. 1 (R85a). It appears printed in full in the appendix (R69a). Madge Hooks, Deputy Clerk, distributed the handbook to the members of the jury panel (R85a). Juror Thomas F. Linderman received one of the handbooks (R88a) and read it (R89a) and assumed that its purpose was to inform him as to his duties as a juror (R89a). Juror Oscar Beeker received a copy of the booklet (R90a) and read it (R90a). He understood its purpose was to inform him as to his duties as a juror (R91a). Mrs. Jessie Burnett, a juror, received a copy of it and read it (R92a). She assumed it was instructing her as to her duties as a juror (R92a). Juror W. E. Coker received a copy (R93a) and read it (R93a) and assumed it to be instructing him as to his duties as a juror (R95a). He considered it described the duties of jurors (R95a). Juror A. S. Bartlett received the booklet and read "a few points of law that was in it" (R97a). Mrs. Margaret

M. Whaley, juror, received the booklet (R98a) and read part of it (R98a). Juror Dana F. Phipps received a copy of it and read part of it (R99a-100a). Juror James Ruth received a copy and read it and considered the booklet was giving instructions to the jurors (R100a-101a). Juror George W. Cruze received the booklet and read part of it (R102a). Juror Herbert F. Hartman received the booklet and read part of it and considered its purpose was "to learn a man how to conduct himself as a juror" (R103a). Byron Pope, the Clerk of the Court, testified that the Clerk's office distributed the booklet to each of the jurors (R123a).

The defendants requested an instruction to the effect that the Government, in the amended order of attachment, had charged that the fifteen defendants had entered into an agreement or agreements with Kasper during the months of November and December 1956, and that the law required the Government to prove such agreement or agreements beyond a reasonable doubt. The requested instruction is printed in full in the appendix (R56a). It was refused by the Court.

The fifteen defendants requested an instruction to the jury to the effect that the Government having failed to call as witnesses the real parties in interest, the negro students, the jury could properly conclude that their testimony, if called, would be unfavorable to the interests of the Government in the case. This instruction was refused (R57a).

The questions raised on this appeal relate to certain rulings and orders of the court and objections to the charge to the jury. We proceed now to acquaint the Court with these questions.

In Grounds IV, V and XII of the motion for new trial (R59a, 63a), it was contended by appellants that the court erred in permitting the United States to intervene in this matter and change the offense charged from one of violating an injunction by commission of alleged specific acts into one of entering into alleged agreements with Frederick John Kasper to violate the injunction and enumerating new and different acts from those alleged in the original attachment and all without notice to appellants or their co-defendants and without opportunity to be heard in opposition thereto, and then proceeding on said amended attachment as an original proceeding and abandoning the original attachment, thereby changing the cause of action without notice.

In Ground VI of the motion for new trial (R60a), error was charged in the Court's refusal to attorneys for appellants to inspect and examine the complete reports made by witnesses for the prosecution to representatives of the United States in connection with matters covered in this case, thereby depriving appellants of an opportunity of full and complete cross examination of the government's witnesses.

In Ground VII of the motion for a new trial, appellants charged that the Court committed reversible error in

refusing to instruct the jury (R60a) to the effect that the amended order of attachment (R60a) charged the appellants with making agreement or agreements in November and December 1956 to violate the injunction (though they were not so charged until the amended order of attachment was issued until February 25, 1957) (R60a), and the Government having so charged it became the duty of the Government to prove the same beyond a reasonable doubt and to a moral certainty.

In Ground XIII of the motion for a new trial, appellants charged that the trial court committed reversible error in charging the jury that Rev. Turner's action was a "good deed" in the face of appellants' contention that it was a bad deed and was a question of fact for the jury to determine as to whether it was good or bad (R63a).

In Ground XVIII of the motion for a new trial, appellants charged that the trial court committed reversible error in refusing to charge the jury that the real parties in interest (negro students) not having been called by the government to testify, the jury could properly conclude that their testimony, if given, would have been unfavorable to the interest of the government (R64a).

In Ground XXI of the motion for a new trial, appellants charged that the trial court committed reversible error in allowing or permitting the Clerk to issue to each member of the jury panel a pamphlet entitled "Handbook For Jurors Serving in the U. S. District Courts" (R65a) in that said booklet alters the statutory manner of electing jurors, supplements the instructions

of the court, contrary to law, denies to the defendant his constitutional right under the Sixth Amendment to be represented by counsel with right to object to instructions given to the jury; and the booklet contains erroneous information and numerous inaccuracies and its use declared to be reversible error by the Circuit Court of Appeals for the Seventh Circuit.

The trial court ruled against the appellants on each of the above grounds assigned as error and entered an order overruling the motion for a new trial (R159a).

The court sentenced Lawrence Brantley, Alonzo Bullock and Clyde Cook each to two years probation; Mary Nell Currier to twelve months probation; and W. H. Till and William Brakebill each to fifteen months probation (docket entries, R14a). The appellants have appealed to this Court from said conviction and sentence.

The trial court from time to time instructed the jurors to refrain from watching television shows, having any reference to this trial.

On July 18, 1957, this trial was in progress. At the same time, a heated debate was in progress in the United States Senate on the so-called "Civil Rights Bill", and great public interest was aroused over the issue "Can a Southern Jury be depended upon to convict in a civil rights case?" On that date while this trial was in progress and while Juror Powell May was actually sitting and serving as a juror on the trial of this case, the "Dave Garroway Program" on television (R108a)

had a skit of about five minutes' duration on the theme "Can a Southern Jury be depended upon to convict in a civil rights case?"; and Jury May was told by a neighbor's wife, Mrs. Ray Carroll Jones, that her husband, Ray Carroll Jones, was going to be on the program and invited Juror May over to her house to look at it. Juror May went to the Jones home and saw the whole of it (R109a,110a). Pastor Trentham of the First Baptist Church, of which Juror May was a member and regular attendant, was also on the program (R109a). They showed on the screen a picture of the Powell May home taken from the home of Ray Carroll Jones. According to Juror May, the television announcer then said: "'We have in the news this morning one of the jurors who has been selected at random.'—I recall that remark. 'As selected at random from the jurors who will hear the Clinton integration case. Mr. Powell May of Knoxville, Tennessee. And here is one of his acquaintances and neighbors who will tell us something about him.'" (R114a).

Further quoting the record of the testimony of Juror May (R114a):

> "It went on something like that, and then Mr. Jones appeared on the film and was interviewed by this announcer, the identity of whom I am not familiar with."
>
> By the Court:
>
> "Q. What did Mr. Jones say so far as you can remember about you?
>
> "A. Well, he questioned Mr. Jones. He said, 'How long have you known Mr. May?' And the usual

questions of that nature. And he said, 'Approximately three years, or two years.' And, 'Well, what kind of a neighbor is he?'

"'Well, he is a good neighbor, cooperative and (72) friendly, and I like him,' and so forth and so on.

"And there was half a dozen questions of that nature concerning me as an individual.

"'Well,' he says, 'do you think he will render an honest decision in the case that he is hearing?'

"Jones says, 'I don't think there is any doubt about that'—or words to that effect. 'I think he can be depended on to say what he thinks is really correct.'

"With that that portion of the interview ended, and then it proceeded from that, I believe, to Dr. Trentham, and he was asked about the same kind of questions except not as a neighbor but as a pastor of the church.

"'How long have you known Mr. May?'

"'Well, three years or four years, something like that, and I know him as a member of my congregation.'

"'Well, what do you think of Mr. May as a citizen and discharging his duties on the jury in this Clinton case?'

"He said, 'Well, I think Mr. May is a christian gentleman and I expect him to render an honest and straightforward decision regardless of the consequences.'

"And I think that was the gist of what Mr. Trentham had to say."

CONTENTIONS IN SUPPORT OF PETITION.

Petitioners show that a writ of certiorari should be granted in this case for the reason that the Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decisions of other courts of appeals on the same matter, and also has decided an important question of Federal law in regard to the jurors' handbook which has not been but should be settled by this Court and has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by the lower court as to call for an exercise of this Court's power of supervision under the provisions of Rule 19(b) of the rules of this Court. This will be shown in the presentation of the following questions for decision in this case.

A—QUESTION I. Was it not reversible error for the trial court to amend the original order of attachment charging certain named individuals with specific acts violative of the alleged injunction into an order of attachment charging these and other defendants with criminal contempt, thereby changing the cause of action without notice to any of the defendants?

The Court of Appeals decided this question in the negative and in so doing probably ruled adversely to the holding in *United States v. Personal Finance Co. of New York*, 13 F.R.D. 306 (1952).

B—QUESTION II. Was it not reversible error for the Court to refuse to counsel for defendants under the

Jencks case prior to trial on request the right to the production of all statements of witnesses bearing on testimony which might be given by Government witnesses?

The Court of Appeals decided this question in the negative and in so doing probably conflicted with the decision in *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007; and *United States v. Hall*, 26 U.S.L.W. 2060 (U.S.D.C.W.Ky.).

C—QUESTION III. Was it not reversible error for the Court to refuse to instruct the jury to the effect that the Government, having alleged an agreement or agreements between Kasper and each of the other defendants during the months of November and December 1956, was required by law to prove said agreement or agreement beyond a reasonable doubt and to a moral certainty?

The Court of Appeals decided this question in the negative, and in so doing probably brought its decision in conflict with *Asgill, et al. v. United States*, (CCA Va.), 60 F. 2d 780; *United States v. Saglietto*, 41 F. Supp. 21; *United States v. Armour & Co.*, 48 F. Supp. 801; and *Weinstein v. United States*, 11 F. 2d 505.

D—QUESTION IV. Was it not reversible error for the lower court to instruct the jury that Rev. Turner's action was a "good deed" in the face of defendants' contention that it was a bad deed, and when that question of fact was an issue for the jury to decide?

The Court of Appeals decided this question in the negative and in so doing probably brought the decision in conflict with *Lotteakos v. United States*, 66 S. Ct. 1239, 328 U. S. 750, 90 L. Ed. 1557; *United States v. Curzio*, 170 F. 2d 354; *O'Shaughnessy v. United States*, 17 F. 2d 225; *Kolp v. United States*, 2 F. 2d 953.

E—QUESTION V. Was it not reversible error for the lower court to refuse to instruct the jury to the effect that the real parties in interest, the Negro students, not having been called by the Government to testify, the jury could properly conclude that their testimony would have been unfavorable to the interest of the Government?

The Court of Appeals decided this question in the negative, and in so doing probably brought its decision in conflict with *Milton v. United States*, 110 F. 2d 556, 71 App. D. C. 394; and *Clayton v. United States*, 152 F. 2d 402.

F—QUESTION VI. Was it not prejudicial and reversible error for the lower court to allow or permit the Court Clerk to issue to each member of the jury panel a pamphlet entitled "Handbook For Jurors Serving in the United States District Courts"?

This question was decided in the negative by the Court of Appeals, and in so doing it brought the decision in probable conflict with the provisions of the Sixth Amendment to the United States Constitution guaranteeing the right of representation by counsel to object to instructions, and was also in probable conflict with

the decisions in *Gadsden v. United States*, 233 F. 2d 626; *Powell v. Alabama*, 287 U. S. 45, 77 L.Ed. 158, 53 S. Ct. 55; *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 582.

G—QUESTION VII. Was it not reversible error for the Court to hold that the evidence did not show that the jury was tampered with?

The Court of Appeals answered this question in the negative, and in so doing probably brought its decision in conflict with the decisions in *State v. Daniel*, 80 S. Ct. 368, 61 SE 1073, holding that the lack of an objection to an introduction of Juror May's testimony that his mind was not influenced by the extraneous matter must not be accepted as proof that his mind was not so influenced, and the failure to object to the introduction of this evidence does not render the evidence competent as proof of the fact that his mind was not so influenced.

In addition, the decision is in probable conflict with the decision of this Court in *Mattox v. United States*, 13 S. Ct. Rep. 50, 146 U. S. 140, 36 L.Ed. 917; *Remmer v. United States*, 74 S. Ct. 450, 347 U. S. 227, 98 L. Ed. .....; and the decision of the Court of Appeals for the Eighth Circuit in *Wheaton v. United States*, 133 F. 522.

H—QUESTION VIII. Did the Court not err in failing to pass upon the question of whether or not the injunction which these petitioners allegedly violated is repugnant and violative of the First Amendment of the United States Constitution?

The Court did not pass upon the question raised as to the injunction being so broadly worded that it is void on its face and is violative of the First Amendment. In other words, if this injunction is valid, then it is quite probable that freedom of speech is dead, particularly with respect to the integration issue pertaining to the High School in Clinton, Tennessee.

I—QUESTION IX. Did the Court not err in holding that it had jurisdiction over the alleged co-conspirators and jurisdiction to convict them?

The record in this case shows that these petitioners did not have any actual knowledge of the injunction. They had only constructive knowledge at best and constructive knowledge has no place in criminal law.

CONCLUSION.

For all of the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals is manifestly erroneous, and this Honorable Court should exercise its discretionary powers to correct the errors herein complained of and overrule the judgment of the District Court. The petition for certiorari should, therefore, be granted.

Respectfully submitted,

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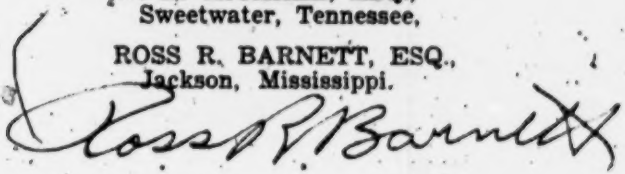
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Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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OPINION OF THE UNITED STATES COURT OF APPEALS.

Filed Feb. 27, 1959, Carl W. Reuss, Clerk.

Nos. 13,512-13,513.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ALONZO BULLOCK, WILLIAM A. BRAKEBILL, LAWRENCE J. BRANTLEY, CLYDE A. COOK, MARY NELL CURRIER, and WILLARD H. TILL,

Appellants,

versus **No. 13,512.**

UNITED STATES OF AMERICA,

Appellee.

FREDERICK JOHN KASPER,

Appellant,

versus **No. 13,513.**

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided February 27, 1959.

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

ALLEN, Chief Judge. These appeals grew out of proceedings charging appellants and others with criminal con-

tempt under Title 18, U. S. C., Section 401 (3). The contempt proceedings were heard as one case in the District Court, severance having been denied. The appeals were argued separately before this court on behalf of appellants Bullock, et al., hereinafter called Bullock (Appeal No. 13,512), and by appellant Kasper (Appeal No. 13,513). Many questions raised by Bullock and by Kasper are identical and will be discussed in general without designation of particular parties. A motion for judgment of acquittal was made by all defendants and denied and the case was submitted to the jury. Four of the persons charged were acquitted, but the jury found defendants Bullock, Brantley, Brakebill, Cook, Currier, Gill and Kasper guilty of criminal contempt under Title 18, U. S. C., Section 403 (1). The District Court entered a judgment sentencing all appellants for criminal contempt of court.

The court held that appellants had violated an order of the District Court issued January 4, 1956, in *McSwain v. County Board of Education of Anderson County, Tennessee*, 138 Fed. Supp. 570 requiring the discontinuance of racial segregation in Clinton High School, Clinton, Anderson County, Tennessee, by the fall term of 1956. Pursuant to this order such integration was put into effect by the school executives and teachers. Twelve negroes were enrolled in a school having approximately 800 white pupils.

August 25, 1956, Kasper came to Clinton, and thereafter tried to induce various persons to oppose the obedience of the school officials to the order, and threatened to have the principal of the school ousted. Kasper

took other steps aimed at preventing the effectiveness of integration and achieving the restoration of segregation in the high school, helping to set up widespread organizations for this purpose among the citizens and the high school students.

On the petition of D. J. Brittain, Jr., principal of the high school, and others, the court on August 29, 1956, issued a temporary restraining order against one John Kasper and others, enjoining them, "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them * * * from further hindering, obstructing, or in anywise interfering with the carrying out of the aforesaid order of this Court [the integration order of the court issued January 4, 1956], or from picketing Clinton High School, either by words or acts or otherwise." None of the appellants in the Bullock group were named in this order. The temporary restraining order was personally served on Kasper on August 29. Thereafter, a preliminary injunction issued upon hearing and after further hearing by the District Court the injunction was made permanent on September 6, 1956.

On December 5, 1956, the United States Attorney filed a petition charging the Bullock group and others with criminal contempt for violating the injunction and on that date an order of attachment was issued by the court describing in detail certain alleged acts of criminal contempt and ordering that the persons named be apprehended and tried.

On February 25, 1957, the court ex parte issued an amended order of attachment stating that the present appellants and others had actual notice of the permanent injunction of September 6, 1956, and that the present appellants and others had, during the months of November and December, 1956, "entered into an agreement or agreements to violate and to cause others to violate" the injunction, and that these appellants and others in active concert and participation with Frederick John Kasper had violated the permanent injunction in respects set out in the amended order. Under this amended order Gates and Kasper were arrested and given bail. The trial started July 8, 1957. The overt acts referred to in the amended order of attachment were not the same as the acts charged in the original attachment order. It was charged in the amended order of attachment (1) on or about November 27, 28, 29, 30, and December 3 and 4, 1956, appellants and others congregated in a threatening manner along the route to the Clinton High School taken by negro students and intimidated them from attending Clinton High School. Charge 2 was dropped because John Gates died before the trial. It was charged (3) on December 4, 1956, when Rev. Paul Turner escorted the negro students to the school, he was vilified, attacked and badly beaten by appellants.

Evidence as to the following facts was shown at the trial: For a number of days in September and for several days in the latter part of November, 1956, all local newspapers and radio and television stations gave great publicity to the temporary restraining order issued by the District Court on August 29, 1956. These broadcasts

and newspaper articles made it plain that the injunction prohibited interference with the integration of Clinton High School and the picketing of Clinton High School.

During the week following August 27, 1956, there had been considerable disturbance outside the high school. Enrollment dropped greatly but thereafter, until the end of November, the problems subsided and attendance rose. On November 27 or 28 appellants Brakebill, Brantley and Bullock stationed themselves at the street intersection which the negro children had to pass to reach the high school. Appellants remained until 8:30, the opening hour for school, or until 8:45 a. m. This surveillance was repeated every day for the remainder of the week. The negro children did not come to school. On Monday, December 3, appellants appeared again at the same place. Cook and Bullock made abusive remarks about Rev. Turner, the integrationist who planned to accompany the negro children to the school. Rev. Bullock stated that if the negro children were not taken out of the school someone would get killed.

On Tuesday, December 4, many cars were parked in the area of the road leading from the negro section to the school. Bullock, Cook and Rev. Turner were present. Cook told Rev. Turner that they wouldn't let him get away with escorting the negro children to the school. The chief of police asked Bullock to leave before there was trouble, but Bullock refused, stating, "You want me to leave so that you can bring these colored children down here to school." Bullock said that he was up

there "to keep us 'nigger lovers' from taking those 'niggers' to school" and that he would keep the white school white and there would be trouble. Later the same morning Rev. Turner and two other men escorted the negro children through the crowd to the school. Brakebill, Cook and Currier made threatening statements to the negro children and to the men escorting them and followed Turner and the children down the hill, obscene remarks being made. After Turner had escorted the negro children to the school and come back there was more abusive language from Brakebill, Bullock and Currier. Turner walked on and Cook attacked him. Turner backed away but was followed and Cook struck Turner, who was unarmed. Turned pushed his way through the crowd to an automobile and was pounded against the fender. Turner fell on his knees and his head was pushed against the fender while the crowd yelled "Kill him." The police came and arrested Cook.

Appellants did not deny this testimony. They introduced evidence that while they were opposed to integration they were seeking legal means to do away with it; that the members of the White Citizens Council, organized during this general period, did not believe in violence; that there was no trouble until the Rev. Turner decided to bring the negro children to school.

The District Court found that Kasper had actual notice of the permanent injunction of September 6, 1956. Kasper also had received personal notice of the temporary restraining order of August 29, 1956, which was served on him by the United States Marshal. Kasper took the

order from the Marshal after a portion of it was read to him, stating "I know what it is. It is an injunction prohibiting me from interfering here in this school business.". Kasper had previously been found guilty of contempt of court for inciting the citizens of Clinton and of Anderson County in a speech he made on August 29, 1956, to violate the restraining order. *Kasper v. Brittain*, 245 Fed. (2d) 92 (C. A. 6), certiorari denied 355 U. S. 834.

Kasper was active in forming the White Citizens Council in Clinton and the Tennessee White Youth. He was the consultant on all questions of framing charters and in general gave advice and counsel to the groups which met at Ann's Cafe and the Southland Cafe in Clinton. Kasper was seen meeting with the students of the Clinton High School. Testimony was given as to frequent meetings in a room of the Southland Cafe. The charter of the White Citizens Council was taken out by several citizens of Clinton, including John Kasper. Kasper issued a press release in connection with the formation of Tennessee White Youth. He paid to have the charter notarized and drove around the county with those active in the formation of this group.

Kasper also directly took part in inciting individual citizens to violate the order of the court. As testified by Mr. D. J. Brittain, the principal of the High School, Kasper had the following conversation with him:

> Q. What did he say?
>
> A. Well, Mr. Kasper asked me what I was going to do in regard to getting the Negroes out of Clinton

High School. And I told him I could not do anything as we were under a court order to accept these Negroes in Clinton High School.

Q. Was there anything else said between you and him?

A. Yes. He stated to me that other people other places had not accepted these people. I told him that I was under the impression that these people were not under a court order as we were.

* * * * * * * *

A. Well, there was more discussion. There was several people there that asked questions and made comments, and Mr. Kasper then said, "Let's get back to this issue." He said, "What are you going to do?" And I told him that I had only three courses. One was to obey the law, second disobey the law; third, resign my job, and that I intended to obey the law.

* * * he finally said that they would get me out of the school before the year was over * * *.

Similar testimony was given by James Leo Burnett, who said in answer to questions put to him:

A. John Kasper came to my home the latter part of August. I expect it was the first day he was in town. And asked me to join in his program of ousting the Negroes from Clinton High School.

Q. Where did you have that conversation with him?

A. In my back yard.

Q. At your home?

A. Yes, sir.

Q. Was that before or after school had started?

A. That was before school started.

Also on the morning of December 4, Burnett testified that Kasper was talking to the Rev. Turner. He said, "Is your name Turner? * * * he said, "You can't get away with this."

Both Kasper and the Bullock group urged that the verdict was not supported by the evidence. The recital of the above facts requires the contrary conclusion.

A motion for severance was made by Bullock on the ground that for the Bullock group to be tried with Kasper would greatly prejudice the Bullock case. The denial of this motion by the court is assigned as reversible error. In ruling on questions of severance the District Court is vested with a wide discretion. Fed. Rules Cr. Proc. rule 14, 18 U. S. C. Such refusal is not assignable as error unless abuse of discretion is affirmatively shown. *Stilson v. United States*, 250 U. S. 583. In view of the close connection between Kasper and the Bullock group as manifested in the presence of all appellants at, encouragement of, and participation in acts of violence committed December 4, 1956, in an effort to hinder and destroy obedience to the lawful order of the court, we conclude that the discretion of the court was not abused.

Appellants contend that the District Court erred in issuing the injunction for the reason that Rule 17 of the Federal Rules of Civil Procedure was violated. They assert this because of the alleged fact that the action seeking an injunction was not prosecuted in the name of the real parties in interest.

The petition for prosecution for criminal contempt due to the violation of the permanent injunction order of September 6, 1956, was filed by the United States Attorney December 5, 1956. The first order for attachment was based upon this petition. However, the petition of August 29, 1956, praying for a temporary restraining order, was filed by the principal of Clinton High School, a member of the Board of Education of Anderson County, the Assistant Attorney General for the 19th Judicial Circuit for the State of Tennessee, and two attorneys who had been connected with the desegregation litigation of Clinton High School. These persons sought the protection of the court for the High School in their concern for the maintenance of "respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States. • • •"

We think the Federal Rules of Civil Procedure, including rule 17, have no application to a criminal contempt action which is instituted by notice under rule 42 (b) of the Federal Rules of Criminal Procedure, Title 18. The rules governing criminal contempt are found in this rule 42, Federal Rules of Criminal Procedure, sub-section (b) of which reads as follows:

> "(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge

> in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

The provisions for arrest, bail and punishment have more of a criminal than a civil character. Since the action is punitive and sentence is imposed for the purpose of vindicating the authority of the court, *United States v. United Mine Workers of America*, 330 U. S. 258, the public has an interest in the controversy. The public interest of the parties who sought the temporary restraining order was held in *McSwain v. County Board of Education of Anderson County, Tennessee, supra,* to be sufficient to permit them to seek injunctive relief. The District Court stated in the first Kasper case (*Kasper v. Brittain*) that in criminal contempt it was "only necessary for some reputable party or parties to make known to the Court that a prima facie case exists that the Court's order is being violated." Inasmuch as this court upheld the conviction on appeal this point has been adjudicated. Also, appellants, not having appealed from the order of the injunction, have waived the right to attack the court's jurisdiction in a criminal contempt

proceeding. *Jennings v. United States*, 264 Fed. 399 (C. A. 8).

The further contention that the injunction of August 29, 1956, is invalid under Federal Rule of Civil Procedure 65 because there was no showing of immediate and irreparable injury in the petition for the temporary restraining order also is without merit. This order was issued without notice to Kasper and certain other named persons. However, it was alleged in substance in the petition that immediate and irreparable injury would be sustained by the school and Anderson County if the actions of the defendants were not restrained. The temporary restraining order in its terms specifically complied with the provisions of rule 65, whether or not the Rules of Civil Procedure be considered applicable here. The petition described picketing at the school with large and threatening crowds continuously keeping students from the school, an attack being made upon a negro child. This constitutes in effect an allegation of immediate and irreparable injury. A full hearing was had with respect to the permanent injunction. Even if the injunction was invalid, appellant was chargeable with criminal contempt for violating it, for the order of the District Court was in full force and effect until set aside in an orderly way. *United States v. United Mine Workers of America*, *supra*, 290, 291, 292.

The District Court had jurisdiction to issue the injunction. Title 28, U. S. C., Section 1651. As pointed out by Chief Judge Simons in *Kasper v. Brittain*, *supra*, it would seem that the case of *Brown v. Board of Educa-*

tion, 349 U. S. 294, its associated cases, and the judgment of this court in *McSwain v. County Board of Education of Anderson County, Tennessee, supra*, constitute a conclusive response to appellants' contentions on this point. As the Supreme Court stated in *Brown v. Board of Education, supra:*

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."

Brewer v. Hoxie School District No. 46 of Lawrence County, Arkansas, 238 Fed. (2d) 91, 98 (C. A. 8), in a full review of the question declared:

> "* * * jurisdiction of the federal courts to issue injunction to protect rights safeguarded by the Constitution is well established. See * * * *Bell v. Hood, supra*, 327 U. S. at page 684, * * * 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' An injunction will issue wherever necessary 'to afford adequate protection of constitutional rights.' *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 95, * * *. Federal courts have the power to afford all remedies necessary to the

vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available."

To the same effect see *Kasper v. Brittain, supra.*

All appellants contend that it was reversible error to substitute for the order of attachment issued December 5, 1956, the amended order issued February 25, 1957. They urge that the amended attachment order changed the original proceedings from one arising out of a civil suit to a prosecution for criminal conspiracy by the United States against individuals not originally named and others. This contention in material points is not correct. The original petition filed August 29, 1956, prayed for injunctive relief against the picketing of the high school and also asked the court to issue show cause orders why Kasper and five others should not be held in contempt of the orders of the court. The amended order did not allege violation of the conspiracy statute, Title 18, U. S. C., Section 371, but charged criminal contempt.

Rule 42 of the Federal Rules of Criminal Procedure provides that criminal contempt actions are initiated neither by indictment nor by information, but by simple notice. The requirements of the section are less strict and technical than those of the statutes under which criminal causes are instituted. The contempt proceeding is summary in character and technical pleadings are not required. *MacNeil v. United States*, 236 Fed. (2d) 149 (C. A. 1), certiorari denied, 352 U. S. 912. See also

United States v. United Mine Workers of America, supra, 296-7. In that case the contempt described in the petition was not denominated "criminal as required by the rule." Defendants urged that the omission of the words "criminal contempt" from the petition and rule to show cause was prejudicial error. The Supreme Court held that Rule 42 (b) "requires no such rigorous application" and stated, "Its purpose was sufficiently fulfilled here * * *."

Decisions involving requirements for the framing or amending of indictments are not applicable. We therefore do not discuss many authorities relied on by appellants.

Appellants contend that the second attachment order violated Rule 7 (e) of the Federal Rules of Criminal Procedure which provides that the court may permit an information to be amended at any time before the verdict if no additional offense is charged and if substantial rights of the defendant are not prejudiced.

No rights of the appellants were violated by the issuance of the second attachment. The original attachment and the amended attachment each charged the same offense, namely, criminal contempt. The temporary restraining order of August 29, 1956, enjoining and restricting John Kasper and others from hindering, obstructing, or in anywise interfering with the carrying out of the integration order of January 4, 1956, was addressed not only to the agents, servants, representatives and attorneys of Kasper and others, but to "all other persons who are acting or who may act in concert with

them * * *." The addition in the amended order for attachment of an allegation of an agreement to violate and cause others to violate the injunction in active concert and participation with Frederick John Kasper fell within the terms of the temporary restraining order of August 29, 1956, made permanent on September 6, 1956. The essence of the charge in both attachment orders was that appellants had violated the injunction of the District Court. No additional offense was charged. Appellants were cited both in the original order and the amended order. Kasper, the only appellant added by the amendment, makes no objection on this point.

Neither were appellants prejudiced by the amendment. While the overt acts charged in the original attachment were previous to and hence different from those charged in the amended order, appellants had ample notice of all acts charged and full understanding of what they were. Cf. *United States v. United Mine Workers of America*, *supra*, 296, 297. The amended order was issued on February 25, 1957. The trial started on July 8, 1957, and appellants had ample opportunity to prepare for hearing.

The fact that Kasper's application for a bill of particulars was refused is not material. The charge was specific and detailed. Kasper was not entitled to be given details of the government's evidence to be presented at the trial. *The Kansas City Star Company v. United States*, 240 Fed. (2d) 643 (C. A. 8)

It is urged that reversible error existed because before the hearing appellants requested the production of all statements and other matter bearing on the testimony which might be given by Government witnesses. This request was renewed at the trial. The court ruled that appellants would be entitled to receive statements of a witness produced by the Government only after the witness had testified. Also the court deleted portions of certain statements which it considered not relevant. Relying on *Jencks v. United States*, 353 U. S. 657, appellants contend that the pre-trial production of all statements given to the FBI in the case is required. On the contrary, the *Jencks* opinion points out that the petitioner was entitled to an order directing the production of statements "touching the events and activities" as to which certain witnesses "testified at the trial."

The statute, 18 U. S. C., Section 3500, enacted shortly after the announcement of the *Jencks* case, expressly prohibits pre-trial discovery of such reports. It is significant that the Senate Report upon the Bill, No. 981, 85th Congress, 1st Session, Appendix p. 8, states that the provision prohibiting pre-trial disclosure was inserted to avoid the misinterpretation of *Jencks v. United States* which had occurred in some court decisions, a matter which was surprising to the Committee, particularly when the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pre-trial production." Pre-trial discovery of such material has been denied in numerous district court cases subsequent to the *Jencks* case.

The Government's appendix shows that the court complied fully with the principle of *Jencks v. United States*. In fact, it presents many instances in which material asked for from a particular witness was placed at the disposal of appellants' attorney at the opening of the examination. Since such reports must be of the events and activities related in the testimony, *Jencks v. United States, supra*, clearly the trial court must determine whether the statement or portions thereof touch upon such events and activities. It was not error for the District Court to screen the reports to determine whether some part of them was irrelevant and immaterial.

Various prejudicial errors are claimed to exist in the charge. With reference to the attack on Rev. Turner the court characterized Rev. Turner's act in conducting the negro children to the high school as a "well-intentioned contribution" and as a "good deed." Appellants say this was an invasion of the province of the jury. Whatever influence these words might have had against appellants was wiped out by the later charge of the court that "From the standpoint of segregation it might not be considered a well-intentioned contribution." The court properly left it to the jury to determine what Rev. Turner's intention was.

It is also contended that the District Court did not adequately charge the jury that the prosecution must prove beyond a reasonable doubt the agreement or agreements between appellants.

The court instructed the jury that before it could convict it must find three facts:

(1) That appellants had notice of the injunction.

(2) That appellants committed acts in violation of the injunction in concert with Kasper.

(3) That these acts had the effect of hindering or obstructing the integration of the Clinton High School in violation of the injunction.

Under the charge the jury was required to be convinced beyond a reasonable doubt of the existence of each of these elements of the offense before it could convict. Read as a whole the charge is fair and accurate.

Also, appellants claim that the refusal of the court to charge that the failure of the Government to subpoena any of the negro high school children raised a presumption that their testimony would be unfavorable to the Government. The refusal was not erroneous. It was not shown to be peculiarly within the power of the Government to produce the witnesses. It is only when this fact appears that the presumption arises. *McGuire v. United States*, 171 Fed. (2d) 136 (C. A. D. C.). As the witnesses were equally available to both parties, the court did not err in refusing the instruction. *Shurman v. United States*, 233 Fed. (2d) 272 (C. A. 5).

Appellants also say it was reversible error for the lower court to allow the court clerk to issue to each member of the jury panel a publication entitled "Handbook for Jurors serving in the United States District Courts."

This contention relies upon *People v. Weatherford*, 160 Pac. (2d) 210; *The People v. Schoos*, 399 Ill. 527, and *United States of America v. Gordon* (C. A. 7). No. 11,929, opinion on July 16, 1957. In the latter case the judge of the District Court had distributed the same pamphlet given out by the court in the case at bar and this was held to be reversible error. However, in *United States v. Gordon*, 253 Fed. (2d) 177 (C. A. 7), a case heard by the court en banc, the former opinion issued July 16, 1957, was superseded and withdrawn. The Court of Appeals said that, assuming the entire panel read the handbook and that the handbook contained statements inimical to a defendant in a criminal case, the defendant had the right of challenge to the polls. Failure to make the objection on the *voir dire* examination, the court held, constitutes a waiver, for jurors cannot be challenged for bias by a motion for new trial. *Frazier v. United States*, 335 U. S. 497. Under this authority the objection was waived in the instant case, for no objection was made on the *voir dire* examination.

Also, we hold that the District Court did not err in distributing this handbook. It was a pamphlet for the instruction of jurors authorized by the National Judicial Conference, composed of the chief judges of all the circuits, and framed by a committee of highly distinguished jurists. It was not shown that the pamphlet contained anything prejudicial to appellants. We agree with Chief Judge Duffy of the Second Circuit, who stated in *United States v. Gordon, supra*, 186, that the theory of the handbook was that "an informed juror who understood something of the proper functions of a juror could do a better

and more intelligent job than one who went into the jury box with a blank mind and with none but the vaguest ideas of where a juror fitted into the federal judicial picture."

This court gave extensive consideration to the question of using the Handbook for Jurors in *Horton v. United States* and *Johnson v. United States*, companion cases reviewed in 256 Fed. (2d) 138 (C. A. 6). Contention similar to those made herein were raised in the *Horton* case, *supra*, namely, that the use of the handbook is an encroachment upon the jury system and denies appellants a fair and impartial trial. Chief Judge Simons, speaking for the court, said:

> "The challenged language of the handbook, read in context, instructs the jurors that the Judge determines the law to be applied while the jury decides the facts, that the judge declares the law to be and his law controls, that the jury must determine what are the true facts and the jurors are sworn to disregard prejudices and follow the court's instructions and they violate their oath if they render their decision on the basis of the effect their verdict might have in other situations. To say that the challenged statement impinged upon the independent judgment of the jurors would downgrade the intelligence of Federal jurors, impute lack of conscience to them, and defiance of judicial instructions and open the doors to innumerable appeals and petitions of guilty defendants tried by juries which had received the handbook. Upon such thin assumptions as are here advanced, this ought not to be done."

See also *People v. Lopez*, 32 Cal. (2d) 673; *United States v. Allied Stevedoring Corporation*, 258 Fed. (2d) 104, 106, 107 (C. A. 2).

Various constitutional questions are raised by appellant Kasper which require little discussion. Kasper claims that the injunction issued by the District Court violates the free speech provision of the First Amendment to the Constitution. As held in *Kasper v. Brittain, supra*, the right to speak is not absolute. The First Amendment does not confer the right to persuade others to violate the law, *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502. Kasper's proven utterances during the incidents of November and December, 1956, like his speech of August 29, 1956, were clearly calculated to cause a violation of law and hence were not protected by the First Amendment. *Dennis v. United States*, 341 U. S. 494; *Kasper v. Brittain, supra*.

Neither was Kasper twice put in jeopardy by his second conviction of criminal contempt. The first finding of guilty grew out of Kasper's individual contempt committed on August 29, 1956. *Kasper v. Brittain, supra*. The present conviction grew out of a separate and subsequent contempt, consisting of Kasper's acting in concert with others to violate the permanent injunction issued September 6, 1956. One of Kasper's particular acts in violation of the permanent injunction, namely, his effort to prevent Rev. Turner from conducting the negro children to school, was done December 4, 1956.

Under the Constitution Kasper is not immune from prosecution for contempt of court committed in November and December, 1956, simply because he was found guilty of a similar contempt which occurred in August, 1956. Successive and separate contempts are punishable as separate offenses. *Jennings v. United States*, *supra*. Cf. *Tobin v. Pielet*, 186 Fed. (2d) 886 (C. A. 7).

Kasper also urges that he was denied the right to a speedy trial guaranteed by the Sixth Amendment because four months passed from the time the amended order of attachment issued to the time of trial. The right to a speedy trial is necessarily relative. *Beavers v. Haubert*, 198 U. S. 77. The Sixth Amendment does not guarantee an immediate trial. No prejudice and no features of arbitrary, oppressive or vexatious delay were shown. Cf. *Chinn v. United States*, 228 Fed. (2d) 151 (C. A. 4).

Furthermore Kasper contends that he was denied due process of law under the Fifth and Sixth Amendments upon the ground that the Attorney General and the Director of the Bureau of Prisons refused to transfer him from a Federal prison in Florida to a prison in or near Washington, D. C. Kasper's attorney was located in Washington and Kasper claims that this denial of transfer deprived him of effective assistance of counsel. This objection is overruled. The record shows that Kasper was effectively assisted by counsel. Also, nothing in the Constitution guarantees a prisoner serving a lawful sentence the right to be transported to another locality to be near his attorney on appeal.

A further question presented on this appeal is the contention that the jury was tampered with by employees of a broadcasting company producing a network television program while the trial was in progress in which the foreman of the jury, Mr. Powell May, was directly involved. The facts are developed on motion for new trial which was denied by the trial court. The court had instructed the jury not to view television programs, read the papers or listen to radio accounts of the case. May was invited by his next door neighbor, Mrs. Ray Carroll Jones, to come to her house and view a television broadcast in which Mr. Jones was to be shown. It does not appear that May was told the subject of the program. When questioned about the invitation May said, "I want to explain that we have no television receiver and [are] not particularly interested in television shows and knew nothing about the preparation of this particular program.

* * * We did not know who it concerned, * * *." These statements are not contradicted.

There is no evidence that the network secured or tried to get May's presence for the broadcast. While May failed to follow the court's instructions, there is no evidence of an intention, either upon the part of the network or of Mr. and Mrs. Jones, to influence May in the case.

Defendants claim that the subject of the broadcast was "Will a Southern Jury Convict?" A woman testified that she viewed the telecast, that the announcer said that

"a Southern jury wouldn't convict anyone," and that May was identified as being on the jury.

This woman did not listen to the telecast at the home of Jones. It is undisputed that May came into the Jones home after the particular telecast had begun. May repeatedly declared under oath that the phrase "Will a Southern Jury Convict?" was not used and that that subject was not the theme of the broadcast. The fact that he went to the Jones home after the announcer had begun supports May's statement, for he well could have missed the announcement of a general theme, if any. What May saw on the screen was his next door neighbor Jones and the pastor of May's church being interviewed. The subject seemed to be May as an individual. May testified that no mention of the trial proceedings was made. Both Jones and May's pastor bore witness to May's high character and integrity. Each in effect stated that he believed May would render an honest decision in a trial.

Defendants urge that under these circumstances *Remmer v. United States*, 350 U. S. 377, holds that a presumption of prejudice exists and requires the conclusion that reversible error was established. In the *Remmer* case, *supra*, 380, it was shown that a private party had suggested to a juror that the defendant (one Bones Remmer) had "sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why don't you make a deal with him?" The juror vigorously stated that he could not talk about the case. The court consulted with the district attorney and the

FBI investigated the matter, but defendant and his counsel were not apprised of the investigation. The juror was deeply distressed by the incident and stated to another juror after the trial that he had "been under a terrific pressure." The Supreme Court held that the juror had been "subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made," and held that petitioner was entitled to a new trial.

On the facts presented the *Remmer* case is plainly distinguishable from the instant case.

May was not approached with reference to the instant case. A neighborly invitation brought May over to the Jones house. Moreover, it is questionable whether the rule of the *Remmer* case is applicable to a public broadcast. The *Remmer* case presented a situation of proven tampering by private parties. Here no tampering is proved. The situation here presented arises in many instances where, as here, the jury is not confined for the duration of the trial. As Mr. Justice Holmes, speaking for the Supreme Court, declared in *Holt v. United States*, 218 U. S. 245, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." Despite the admonitions of trial judges, many jurors read newspaper accounts or hear reports on radio and television concerning the trial in which they are serving. This fact does not of itself

invalidate the verdict. Prejudice must be shown. Cf. *United States v. Catalano*, 231 Fed. (2d) 67 (C. A. 2).

Although the trial court had already charged the jury in the instant case not to view television or read or listen to accounts of the trial, it recognized the frequent destruction of complete isolation that arises through radio and television for persons sitting on the jury. The court therefore charged the jury to disregard completely any impressions or information received from other sources, such as radio, television or newspaper articles. Under Fed. Rules of Cr. Proc., rule 33, the trial judge is vested with a wide discretion in the granting of a new trial. We think that discretion was not abused. May did not seek to view the broadcast. May's neighbor and his minister were the only persons besides the announcer who appeared on the broadcast. The neighbor was a segregationist, the minister an anti-segregationist. Each spoke in the highest terms of May's integrity and judgment. We conclude that the District Court's finding that May was not influenced by the broadcast was not clearly erroneous. It is for the judge to decide whether or not private communication is prejudicial. The same rule applies with even more force to public communication which reaches a juror without intention on the part of the broadcaster. In numerous decisions the trial judge has held that a new trial should not be had, although information that superficially appeared prejudicial was transmitted to the jury. Instances where the court held prejudice was not shown include the following: *Gicinto v. United States*, 212 Fed. (2d) 8 (C. A. 8), certiorari denied 348 U. S. 884; *United States v. Allied*,

Stevedoring Corp., 241 Fed. (2d) 925 (C. A. 2), certiorari denied 353 U. S. 984 (seven jurors read account of association of defendant with another man who had been indicted for the same offense); *Reining v. United States*, 167 Fed. (2d) 362 (C. A. 5), certiorari denied 335 U. S. 830 (newspaper account reported that defendant's accomplice was dead and that he had said he would rather take his life than face prosecution); *Miller v. Commonwealth of Kentucky*, 40 Fed. (2d) 820 (C. A. 6) (newspaper articles on the trial found not inaccurate and the court held there was no prejudice). See 31 A. L. R. (2d) 417.

Briggs v. United States, 221 Fed. (2d) 636 (C. A. 6), and *Krogmann v. United States*, 225 Fed. (2d) 220, 228 (C. A. 6), are not in conflict with this decision. In each of these two cases newspaper publicity unfavorable to the defendant was read by members of the jury. Here it is uncontradicted that the broadcast contained no mention of appellants and no discussion of facts tending to prove their guilt or innocence of the pending contempt charge. Moreover, the court charged the jury in forcible terms to ignore any newspaper publicity or broadcasts. No person or organization attempted to tamper with the jury. The publication was not caused by improper action of any government officer. Cf. *Shepherd v. Florida*, 341 U. S. 50. The ruling here was well within the range of discretion vested in the trial judge. In accord see *United States v. Postma*, 242 Fed. (2d) 488 (C. A. 2).

We conclude that the court's decision that May was not in any respect influenced in his verdict by reason of the television program is amply supported by the evidence.

All questions presented have been considered. We find no reversible error in the record.

The judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

(Filed. Feb. 27, 1959, Carl W. Reuss, Clerk.)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 13,512.

ALONZO BULLOCK, ET AL.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(S.) FLORENCE E. ALLEN.
Chief Judge.

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JAMES R. BROWNING, Clerk

No. 868

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALONZO BULLOCK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App.) is not yet reported. The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1959. On March 23, 1959, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Stewart to and including April 28, 1959. The petition was filed on April 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court had authority, four months prior to the hearing, to amend the order of attachment charging criminal contempt.

2. Whether the District Court correctly refused to order pretrial inspection by the defense of statements by prospective witnesses made to the Federal Bureau of Investigation.

3. Whether the jury was properly instructed on the necessity of proving an agreement between the petitioners and their co-defendant Kasper.

4. Whether the District Court properly instructed the jury with respect to the state of mind of the victim of the assault perpetrated by the petitioners.

5. Whether in a criminal contempt action the public, rather than any aggrieved private persons, is the real party in interest.

6. Whether the District Court erred in permitting the distribution to the jury of a handbook for jurors prepared under the authorization of the Judicial Conference.

7. Whether the District Court's determination that a juror was not influenced by a television program depicting him as a fair and impartial person is supported by the evidence.

8. Whether the court was right in holding that petitioners' actions contemptuous of court orders were not protected by the First Amendment.

9. Whether petitioners had knowledge of the injunction which they were charged with violating.

STATUTE AND RULE INVOLVED

1. Rule 30, Federal Rules of Criminal Procedure:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct

the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

2. 18 U.S.C. 3500. *Demands for production of statements and reports of witnesses.*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be [redacted] directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court

in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

On January 4, 1956, the District Court for the Eastern District of Tennessee issued an order in *McSwain* v. *Board of Education of Anderson County*, 138 F. Supp. 570, directing the discontinuance of racial segregation in the high schools of Anderson County, Tennessee, by the fall term of 1956. Pursuant to the order, a number of Negroes were registered, and in August 1956, when school opened, 12 Negroes were enrolled in Clinton High School, Clinton, Tennessee (R. 25b).[1] On August 25, 1956, John Kasper, co-defendant below, arrived in Clinton and took various steps designed to oust the Negroes from the high school (R. 35b). A petition was filed in the District Court for injunctive relief, and on August 29, 1956,

[1] Pages cited as R. 1b, etc. refer to the Government's appendix filed in the Court of Appeals, and now filed as the record in this Court. Similarly, pages cited as R. 1a, etc. refer to petitioners' appendix, now on file in this Court.

that court issued a temporary restraining order enjoining John Kasper and others and "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them," from interfering with the carrying out of the desegregation order (R. 27a). Thereafter, after a hearing, a preliminary injunction issued and, after a further hearing, on September 6, 1956, the injunction was made permanent (R. 29a).

On December 5, 1956, the United States Attorney filed a petition charging the petitioners herein and others with criminal contempt for violating the injunction (R. 16a–18a). An order of attachment was issued by the court pursuant to this petition (R. 19a–22a). On February 25, 1957, the court issued an amended order of attachment which stated that the petitioners and others in active concert and participation with Kasper had violated the injunction by interfering with the desegregation order by (1) congregating in a threatening manner along the route to Clinton High School taken by the Negro students and intimidating these students from entering the school, and (2) vilifying, attacking and badly beating Reverend Turner when he escorted the Negro students to the school on December 4, 1956 (R. 22a–26a).

At the hearing had on July 8, 1957, it was shown that the petitioners had notice of the injunction (R. 12b–19b) and it was further shown that a concert of action existed between them and Kasper (R. 19b, 20b, 23b–24b, 28b–34b, 41b–48b, 62b–67b). Eivdence was adduced that every school-day morning between November 27 and December 3, 1956, several of the petitioners

congregated and stationed themselves in a threatening manner at a street intersection which the Negro children had to pass to get from their homes to the high school (R. 62b–65b). As a result, the Negro children did not go to school on those days.

On December 4, the petitioners and others again parked their cars in the area of the road leading from the Negro section to the school. Threatening remarks were made by several of the petitioners to the effect that they would prevent the Negroes from going to school (R. 36b, 52b). Later that morning, Reverend Paul Turner escorted the Negro children through the crowd to the school. On his way to school, Reverend Turner was threatened (R. 38b–40b, 48b–54b) and when he came back out, petitioner Cook and others struck him (R. 55b, 57b, 61b). In the course of the beating Turner went down on his knees and his head was bounced against the fender of a car (R. 57b). A mob was shouting "kill him" (R. 58b). Ultimately, the police arrived and Cook was arrested (R. 56b).

At the conclusion of the contempt hearing, the petitioners and Kasper were found guilty, while several co-defendants were acquitted (R. 72b). All of the petitioners were sentenced to probation for varying terms. Motions for a new trial were denied.

On February 27, 1959, the Court of Appeals affirmed the judgment of the District Court with respect to Kasper and the petitioners here.*

* Kasper, was sentenced to a term in prison. His conviction, like that of these petitioners, was affirmed by the Court of Appeals. Unlike these petitioners, he filed a petition for a rehearing in that court, which was denied on April 30, 1959.

ARGUMENT

1. It is contended, first, that the District Court erred in amending the original order of attachment. Petitioners apparently claim that the amended order charged a new offense and that this prejudiced their defense.

Rule 7(e) of the Federal Rules of Criminal Procedure provides that an information may be amended at any time before the verdict, if (1) no additional or different offense is charged and (2) the substantial rights of the defendants are not prejudiced.[3] Under the Rule, amendment is permitted up to the time of the verdict. In the instant case the amendment of the order of attachment took place over four months prior to the trial. Not only were the substantial rights of the petitioners not prejudiced by the amendment, but there actually was no cognizable injury of any kind; none is cited to this court.

Moreover, the amendment did not charge a new or different offense; criminal contempt was still the only charge made.[4] Petitioners were cited in both the original order and the amended one; only Kasper was added, and that modification occurred so long prior to

[3] Inasmuch as criminal contempt actions are *sui generis*, a standard of notice even less strict than that of Rule 7(e) may well be applicable. See *United States* v. *United Mine Workers*, 330 U.S. 258, 296, 297; *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004; *MacNeil* v. *United States*, 236 F. 2d 149 (C.A. 1), certiorari denied, 352 U.S. 912.

[4] For that reason, petitioners' reliance upon *United States* v. *Personal Finance Co.*, 13 F.R.D. 306 (S.D. N.Y.), is not well taken. In that case, unlike this one, the amendment charged violation of two wholly different sections of a regulation under the Defense Production Act than had been charged by the original information.

the hearing on the charges that no prejudice to anyone could possibly have resulted.

2. Petitioners question whether the District Court was justified in denying the request for a pretrial inspection of statements given to the Federal Bureau of Investigation by potential witnesses. Reliance is had on *Jencks* v. *United States*, 353 U.S. 657, as construed in *United States* v. *Hall*, 153 F. Supp. 661 (W.D. Ky.).

This issue is fully discussed in the Government's brief in *Rosenberg* v. *United States*, No. 451, this Term, at pp. 30-42. As there pointed out, the Court in *Jencks* was not concerned with pretrial inspection, and most of the courts which have had occasion to consider this question have concluded that such inspection is not compelled. See, *e.g.*, *United States* v. *Rosenberg*, 257 F. 2d 760 (C.A. 3), No. 451, this Term; *United States* v. *Grossman*, 154 F. Supp. 813 (D. N.J.); *United States* v. *Grado*, 154 F. Supp. 878 (W.D. Mo.); *Papworth* v. *United States*, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Benson*, 20 F.R.D. 602 (S.D. N.Y.); *United States* v. *Palermo*, 258 F. 2d 397 (C.A. 2), No. 471, this Term. The Senate Report on the bill designed to clarify the various lower court interpretations of *Jencks* indicates that the Judiciary Committee felt that any construction of *Jencks* requiring pretrial inspection was surprising inasmuch as the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pretrial production * * *." S. Rep. No. 981, 85th Cong., 1st Sess., Appendix, p. 8.

Beyond that, the "Jencks" Act, 18 U.S.C. 3500, *supra*, p. 3, explicitly provides that "* * * no statement or report * * * shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." In view of this clear prohibition on pre-trial discovery of such statements, and since any new trial would have to be held under the procedural rules laid down by Section 3500, it is unnecessary in this case to decide whether *Jencks*, taken by itself, would direct pre-trial discovery. See *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2); *Papworth* v. *United States*, *supra*. Consideration of the claimed error in the light of the changed law does not violate the constitutional *ex post facto* prohibition. *Hopt* v. *Utah*, 110 U.S. 574; *Thompson* v. *Missouri*, 171 U.S. 380. See the Government's brief in *Lev et al.* v. *United States*, Nos. 435–437, this Term, at 65–67.

3. Petitioners maintain that the court erroneously refused to instruct the jury that the proof had to show agreements between Kasper and these petitioners during the months of November and December 1956. This claim is unclear. It may be that petitioners contend that the court refused to charge the jury as to the proof required of agreements to commit particular acts, *e.g.*, the assault on Reverend Turner or the congregating on the road to prevent the Negro children from entering the school; or the contention may be that the court refused to charge the jury as to the proof required of agreements to obstruct integration of Clinton High School in violation of the

injunction. On either hypothesis the point is without merit.[5]

First, it was not incumbent upon the Government to prove that there was a specific agreement to attack Reverend Turner, or to congregate on the road leading to Clinton School so as to intimidate the Negro children. On the contrary, the agreement which the Government proved, and which the court fully explained in the charge, was the agreement to hinder or obstruct desegregation of the Clinton school; this was the illegal agreement which was charged in the attachment order, and the only one pertinent to the case. The means whereby the petitioners and Kasper accomplished the illegal objective of the agreement did not have to be an advance part of the agreement. See *Glasser* v. *United States*, 315 U.S. 60; *United States* v. *Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664; *United States* v. *Klein*, 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924. In all probability, the precise means whereby petitioners obstructed the court order requiring integration of the Clinton school were not wholly formulated until the opportunity arose. Such means might well have to be proved, but not as part of the agreement. See *Braatelien* v. *United States*, 147 F. 2d 888 (C.A. 8).

[5] This was a case of criminal contempt of a court's order, not a criminal prosecution predicated on a conspiracy to commit a specified crime. The distinction between these two types of proceedings is explained in *Kelton* v. *United States*, 294 Fed. 491 (C.A. 3). Accordingly, the cases petitioners cite could hardly be in direct conflict with the decision of the Court of Appeals. In any event, as shown in the text, the court's charge imposed a burden of proof with respect to the agreements which fully complied with the strict requirements of a criminal prosecution.

Secondly, it cannot be seriously contended that the court refused to charge the jury as to the required proof of an agreement between Kasper and petitioners to obstruct and hinder the integration of the Clinton school. This element was explained to the jury several times in the charge. See R. 39a, 48a, 49a, 50a.

4. It is also claimed that the District Court erred when it charged that Reverend Turner's action of escorting the Negro children to the school was a "good deed." What the court did say was that *"From the standpoint of integration what he did was a well-intentioned contribution.* Now the jury is called upon to determine whether his being afterwards beaten had the retroactive effect of *undoing the good deed* done by him earlier in the morning" (R. 53a) (emphasis added). In context the statement was a proper comment on the evidence. See 9 Wigmore, *Evidence,* § 2551 (3d ed.). Additionally, when counsel objected to this portion of the charge, the court gave a supplemental instruction in which it stated, in pertinent part (R. 71b-72b):

> * * * I said to you in the course of the charge that from the standpoint of integration what Reverend Turner did was a well-intentioned contribution. *From the standpoint of segregation it might not be considered a well-intentioned contribution.* * * * If his intention had any bearing on that question, his intention on the occasion in question is a question of fact for the jury to determine * * * [Emphasis added].

After this supplemental instruction had been given, the court asked whether there were any further

objections to the charge, and counsel for petitioners replied in the negative. The present claim of error is therefore foreclosed by Rule 30, F.R. Crim. P.

5. Another contention is that the Negro children were the real parties in interest in this case and that the District Court erred in not instructing the jury that their failure to testify must give rise to an inference unfavorable to the Government.

The action here was for a criminal contempt. Its purpose was to vindicate the dignity of the court; it was a proceeding between the public and the petitioners. Private parties had no standing, and were not the real parties in interest. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. Once a private party has informed the court of the facts which constitute contempt, the matter is out of his hands. *Kienle* v. *Jewel Tea Co.*, 222 F. 2d 98 (C.A. 7).

Furthermore, any right to request an absent-witness instruction must be predicated on a showing that the witnesses were peculiarly within the power of the party failing to produce. The mere issuance of a subpoena to a witness does not establish such exclusive control. *McGuire* v. *United States*, 171 F. 2d 136 (C.A.D.C.). A witness may be called by any adverse party deeming his testimony of importance. And if witnesses are available to both parties, it is not error to refuse to instruct the jury as to the inferences to be drawn from their absence. *Shurman* v. *United States*, 233 F. 2d 272 (C.A. 5); *United States* v. *La Rocca*, 224 F. 2d 859 (C.A. 2).

In any event, the testimony of these children with respect to the question of intimidation would at best

have been cumulative, since there was no charge that they had been intimidated other than by the public events which were testified to by many witnesses.

6. It is also urged that the District Court erred in permitting the distribution to the jury prior to trial of a pamphlet known as the "Handbook for Jurors Serving in the United States District Courts". The practice of distributing this booklet has been attacked in several circuits, but in no case has it caused a reversal. *United States* v. *Allied Stevedoring Corporation,* 258 F. 2d 104 (C.A. 2), certiorari denied, 358 U.S. 841; *United States* v. *Gordon,* 253 F. 2d 177, 184–5 (C.A. 7); *Horton* v. *United States,* 256 F. 2d 138 (C.A. 6); *United States* v. *De Marie,* 261 F. 2d 477 (C.A. 7). In the *Allied Stevedoring* case, *supra,* the court stated (at p. 107): "We find nothing improper in the use of the Handbook. In fact we believe that it accomplishes a necessary purpose and that its use should be encouraged." And, as the Court of Appeals here suggested, petitioners' objection came too late in any event since it was not made on the *voir dire.* See *United States* v. *Gordon, supra; United States* v. *Allied Stevedoring Corp., supra; United States* v. *Mathison,* 256 F. 2d 803 (C.A. 7), certiorari denied, 358 U.S. 857.

7. Another contention is that the District Court erred in refusing to grant a new trial because a juror viewed a television program in the course of which that juror was referred to as a citizen of honesty and integrity who could be depended upon to render an honest verdict.

The District Court found that the juror was not influenced in his verdict by reason of the program, and the Court of Appeals held that this finding was "amply supported by the evidence" (Pet. App. 29). The trial finding was made after a full hearing on the incident and after the court had reviewed the evidence with care and in detail (R. 156a–157a). In view of the innocuous nature of the broadcast, which reflected nothing more than local respect for the juror and faith in his honesty and integrity with regard to the trial, no other conclusion was possible. The facts cannot be so viewed as to compel disregard of both the discretionary power of the trial judge on a motion for a new trial and the determination of the Court of Appeals that he was right in his ruling. Cf. *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (C.A. 2), certiorari denied, 353 U.S. 984; *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), certiorari denied, 335 U.S. 830; *Miller* v. *Commonwealth*, 40 F. 2d 820 (C.A. 6); see, also, 31 A.L.R. 2d 417.

Petitioners rely upon *Remmer* v. *United States*, 350 U.S. 377, apparently for the proposition that a presumption of prejudice exists. But *Remmer* dealt with *private* contacts with the jury which went to the merits of the case then on trial. Here, the medium of communication was public and did not touch on the merits or these petitioners. The general rule with respect to public media of communication was enunciated by Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245 at 251:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.

When jurors happen to be exposed to radio reports, television programs, and newspaper articles concerning the trial—despite the admonitions by the trial judge—the facts must be aired thoroughly and the judge satisfy himself that in fact no prejudice existed. See the Government's brief in *Marshall* v. *United States*, No. 383, this Term. In this case, the trial judge complied with that rule, and there is no reason to overturn his findings which have been confirmed by the Court of Appeals.

8. Petitioners allege error in the appellate court's failure to pass on the question of whether or not the injunction was violative of the First Amendment. Actually, the court did decide this question (Pet. App. 15), citing the case in which it had previously passed on the same question involving the same injunction, *Kasper* v. *Brittain*, 245 F. 2d 92 (C.A. 6), certiorari denied, 355 U.S. 834. There, the court said (at p. 95):

> The right to speak is not absolute and may be regulated to accomplish other legitimate objectives of government. The First Amendment does not confer the right to persuade others to violate the law. Giboney v. Empire Storage Company, 336 U.S. 490, 502 * * *. The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment. Dennis v. United States, 341 U.S. 494

* * *; Feiner v. People of State of New York, 340 U.S. 315 * * *; Beauharnais v. People of State of Illinois, 343 U.S. 250 * * *; Chaplinsky v. State of New Hampshire, 315 U.S. 568 * * *.

It is said by petitioners that "if this injunction is valid, then it is quite probable that freedom of speech is dead, particularly with respect to the integration issue pertaining to the High School in Clinton, Tennessee" (Pet. 19). It is difficult to understand how punishment for the contempt which the petitioners committed when they intimidated small children seeking their constitutional rights, and beat a minister who came to their aid, can rationally be viewed as a blow at free speech.

9. Finally, it is said that the court had no jurisdiction over petitioners because they lacked actual knowledge of the injunction. There is no substance to this contention.

Jurisdiction in actions for contempt for violation of injunctions is not restricted to the persons named or served with process in the suit in which the injunction was issued. *In re Lennon*, 166 U.S. 548, 554. Jurisdiction extends to any person who knowingly aids, abets, assists, or acts in active concert with the person who has been enjoined, and such person subjects himself to criminal as well as civil contempt for violating the injunction. *Reich v. United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004.

Petitioners' assertion that they did not have actual knowledge of the injunction is not supported by the facts. There was ample testimony that they were informed about the injunction and were requested not

to violate it (R. 6b–14b, 19b–21b, 34b–40b). The issue of actual notice was squarely put to the jury in the charge (R. 39a) and determined by them in their verdict.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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